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No. 88-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. May a state court, on remand, amend the findings based on which its decision was reversed by the Supreme Court of the United States and utilize the amended findings as a foundation for denying further affirmative relief including attorneys' fees under 42 U.S.C. section 1988?

2. May a petitioner who has, under the First Amendment, successfully challenged a state court decision prohibiting targeted direct mail attorney solicitations, nonetheless be denied attorneys' fees on remand on the basis that he did not obtain "personal redress" in the Supreme Court of the United States?

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v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, Richard D. Shapero, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky.

CITATION TO PREVIOUS OPINION AND OPINIONS BELOW

The opinion of the Supreme Court of the United States in *Shapero* v. *Kentucky Bar Association,* 486 U.S. —, 108 S. Ct. 1916 (1988) is reproduced in the Appendix to this petition at 1a to 27a. The first opinion of the Supreme Court of Kentucky, on remand, styled *Shapero* v. *Kentucky Bar Association,* 763 S.W. 2d 126 (Ky. 1989) (hereafter referred to as "*Shapero II*"), is reproduced in the Appendix to this petition at 28a to 32a. The second opinion of the Supreme Court of Kentucky, on remand, styled *Shapero* v. *Kentucky Bar Association,* No. 86-SC-335-KB (Ky. April 6, 1989) (hereafter referred to as "*Shapero III*"), is

reproduced in the Appendix to this petition at 33a to 34a. The opinion of the Supreme Court of Kentucky, which was reversed by the Supreme Court of the United States, styled *Shapero* v. *Kentucky Bar Association,* 726 S.W.2d 299 (Ky. 1987) (hereafter referred to as "*Shapero I*"), is reproduced in the Appendix to this petition at 35a to 40a.

JURISDICTION

The judgment of the Supreme Court of Kentucky denying the Petitioner attorneys' fees was entered on January 19, 1989. The judgment of the Supreme Court of Kentucky refusing to take any action whatsoever on remand from the Supreme Court of the United States was entered on April 6, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article III, Section 1 of the Constitution of the United States, which provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

This case involves 42 U.S.C. section 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. sections 1981-1983, 1985, and 1986], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves 42 U.S.C. section 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On March 27, 1987, in *Shapero I,* the Supreme Court of Kentucky adopted American Bar Association Model Rule 7.3, which prohibited targeted direct mail solicitation by attorneys in Kentucky. In so doing, the Supreme Court of Kentucky, in explaining the procedural background of the case, held:

> Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about [the] propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct mail letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.
>
> * * *
>
> We affirm the decision of the Ethics Committee to deny the request.

Shapero I, 726 S.W.2d at 300-01, 36a, 40a.

On October 5, 1987, Shapero's Petition for Certiorari was granted. In an opinion issued on June 13, 1988, the Supreme Court of the United States reversed the Supreme Court of Kentucky's decision in *Shapero I,* and held that the rule in question, on its face, was unconstitutional under the First and Fourteenth

Amendments to the Constitution of the United States and remanded the case for further proceedings. In so doing, this Court made the following finding:

> The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter. . . .

108 S. Ct. at 1921, 6a (quoting *Shapero I*, 726 S.W.2d at 301, 39a) (brackets in original).

On remand, Shapero filed a motion for an award of attorneys' fees under 42 U.S.C. section 1988. In its Opinion and Order, the Supreme Court of Kentucky denied Shapero's motion because Shapero had obtained no "personal redress" in his case and accordingly, the Shapero case bore "no similarity to a section 1983 action." *Shapero II*, 763 S.W.2d at 128, 31a, 32a. In order to reach this conclusion, however, the Supreme Court of Kentucky altered its decision in *Shapero I* which had "affirm[ed] the decision of the Ethics Committee to deny the request [of Shapero to send out his targeted direct mail letter]." *Shapero I*, 726 S.W.2d at 301, 40a. Instead, the Supreme Court of Kentucky in *Shapero II* ruled that its opinion in *Shapero I* had "erroneously stated that we affirmed the decision of the Ethics Committee in denying the request [of Shapero to send his targeted direct mail letter]." *Shapero II*, 763 S.W.2d at 128, 31a.

On February 16, 1989, Shapero petitioned the Supreme Court of Kentucky, consistent with this Court's mandate on remand, to approve the advertisement

which he had proposed, or to transfer the matter for further consideration to the Advertising Commission of the Kentucky Bar Association and to issue an order deleting the targeted direct mail ban that had been adopted in *Shapero I*. But in an order entered on April 6, 1989, the Supreme Court of Kentucky held that it was "both unnecessary and inappropriate for us to take any further action." *Shapero III*, slip op. at 1, 33a. With respect to Shapero's request that the Supreme Court of Kentucky approve his advertisement, the court held, "The issue of approval has never been before this Court." *Id.* at 2, 34a.

Thus, the Supreme Court of Kentucky in *Shapero II* and *Shapero III* amended the *Shapero I* decision *after* it had been reversed by the Supreme Court of the United States. The revised holding by the Supreme Court of Kentucky was that "neither the Committee nor this Court denied any request [of Shapero to send out his targeted direct mail letter]." *Shapero II*, 763 S.W.2d at 128, 31a. As a result, the decisions of the Supreme Court of Kentucky in *Shapero II* and *Shapero III* now directly conflict with the explicit finding made by the Supreme Court of the United States in reversing *Shapero I* that "[t]he court below disapproved petitioners' proposed letter. . . ." 108 S. Ct. at 1921, 6a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions of whether Shapero is entitled to have the letter in question approved and of

whether he is entitled to an award of attorneys' fees under 42 U.S.C. section 1988 were raised by Shapero when he petitioned the Supreme Court of Kentucky for an award of attorneys' fees on October 4, 1988, and for a final judgment on February 16, 1989.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Involves an Important Question Which Directly Affects this Court's Jurisdiction and Is in Conflict With This Court's Decision in *Shapero* v. *Kentucky Bar Association*.

In denying attorneys' fees in *Shapero II* and in refusing to take any further action on remand in *Shapero III*, the Supreme Court of Kentucky amended its holding in *Shapero I* to contradict an explicit finding made by this Court in its opinion reversing *Shapero I*, and then used that amended holding as a basis for denying the requested relief. The Supreme Court of Kentucky's actions raise the substantial Constitutional question under Article III, Section 1, of whether, on remand after reversal, an inferior court is free to recast its prior decision in a fashion which directly contradicts an explicit finding made by this Court and deprives the successful petitioner of the relief granted by this Court.

In its opinion denying attorneys' fees, the Supreme Court of Kentucky held, "[We were] in error in assuming that there was a 'request' [to approve the letter] before us to deny, but this mistake does not create a right where none exists." *Shapero II*, 763 S.W.2d at 128, 32a. And in *Shapero III*, in refusing to consider the letter Shapero had requested permission to

mail nearly four years before, the Supreme Court of Kentucky held, "The issue of approval [of the Shapero letter] has never been before this Court." *Shapero III,* slip op. at 2, 34a. The Supreme Court of Kentucky thereby renounced its previous holding which was: "We affirm the decision of the Ethics Committee to deny the request [of Shapero to mail his letter]." *Shapero I,* 726 S.W.2d at 301, 40a.

When Shapero was first before this Court, he, the Kentucky Bar Association (hereafter "KBA") and this Court all believed that the Supreme Court of Kentucky had denied his request to mail the letter in issue. This is evident from the briefs which were submitted to this Court by Shapero and by the KBA, by the questions and responses in oral argument, and by this Court's opinion.

For example, the KBA admitted in its brief, as well as in oral argument before this Court, that the Supreme Court of Kentucky had considered Shapero's letter in its decision. As stated in the KBA brief, "[T]he [Supreme] Court [of Kentucky] did not approve Shapero's letter, [and] the only conclusion which can be drawn is that the Court held that the use of Shapero's letter was likely to result in the evils of being misleading, overbearing, or of involving other features of deception or improper influence." (Brief For Respondent, page 21).

During oral argument on March 1, 1988, the following exchange took place between Mr. Justice Rehnquist and Mr. Doheny, counsel for the KBA:

QUESTION: Did the Kentucky supreme court disapprove this letter? It did, did it not?

MR. DOHENY: It did.

QUESTION: It disapproved it, did it not?

MR. DOHENY: Yes.

QUESTION: And did it not disapprove it on the basis of the new rule?

MR. DOHENY: Yes.

QUESTION: Well, then, why is the case here? That's what he's bringing here.

(Transcript of the March 1, 1988 Oral Hearing, page 29).

When questioned by Mr. Justice Scalia, Mr. Doheny tried unsuccessfully to retract the admission made to Mr. Justice Rehnquist that the Supreme Court of Kentucky had disapproved Shapero's letter.

QUESTION: Mr. Doheny, it would be a different question if all the Kentucky Supreme Court did was to say, "You're right, the old rule is no good; we're adopting a new rule."

But it didn't just do that. You say that it went further, and in that situation, I can understand why you would say you would have to go back and see whether, under state law, this thing is banned under the new rule.

But the court didn't stop there. It said, "We're adopting this new rule and your letter is banned under the new rule."

MR. DOHENY: Well, perhaps I —

QUESTION: Did it say that or not? If it didn't say that, you have a different case.

MR. DOHENY: Well, perhaps I overstated it, Mr. Justice Scalia, because it does not say in the opinion that they made a finding with respect to this letter. They simply say that, with respect to Rule 7.3, this is an appropriate rule which we now adopt as the law of this government.

QUESTION: Well, your response to one of the other Justice' [sic] questions was that, indeed, there has been a determination that this letter is no good. Now, you're saying there has not been?

MR. DOHENY: I believe I was in error when I said that, Justice.

QUESTION: I don't think so. The next sentence [of the Supreme Court of Kentucky's opinion] says, "We affirm the decision of the ethics committee to deny the request." And the request is to mail out this letter.

So I think they not only set out the appropriate rule we should adopt as the law in the case, but they then go on and affirm the ruling.

(Transcript of the March 1, 1988 Oral Hearing, pages 30-31).

Regardless of what the KBA argued, however, this Court's *opinion* in *Shapero* v. *Kentucky Bar Association* conclusively adjudicated this issue:

- The Supreme Court of Kentucky's disposition of the case below was to adopt Model Rule 7.3 and to " 'affirm the decision of the Ethics Committee to deny [petitioner's] request' for approval of his letter." 108 S. Ct. at 1920 n.3, 4a, (quoting *Shapero I*, 726 S.W.2d at 301, 40a) (brackets in original).

- "The Court below disapproved petitioner's proposed letter solely because it targeted only persons who were 'known to need [the] legal services' offered in his letter, 726 S.W.2d at 301, rather than the broader group of persons 'so situated that they might in general find such services useful.' " 108 S. Ct. at 1921, 6a (brackets in original).

Unquestionably, therefore, this Court based its decision upon the explicit finding that the Supreme Court of Kentucky had ruled upon and denied Shapero's request to mail his letter. The Supreme Court of Kentucky's redetermination on remand that it had *not* previously considered Shapero's request to mail his letter, therefore, contradicts an explicit finding made by this Court.

If the decisions of the Supreme Court of Kentucky on remand are allowed to stand in their published form[1], the Supreme Court of Kentucky will have been permitted to directly challenge not only the basic concept of a "supreme Court" established under Article III, Section 1 of the Constitution of the United States, but also more than a century of decisions from this Court which reinforce its "supremacy" over inferior courts.

Inferior courts have always been required to follow to the letter decisions of the Supreme Court of the

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[1]On the face of both the *Shapero II* and *Shapero III* decisions, the Supreme Court of Kentucky ordered that they were "TO BE PUBLISHED."

United States following remand. As this Court held in *Ex parte Howard*, 76 U.S. (9 Wall.) 175, 183 (1869):

> [I]t is the duty of all inferior courts to yield a prompt obedience to the mandate of this court; or, in other words, to treat as conclusive the judgment of this court *upon the law and facts presented to it* in appropriate form for consideration. Any other conduct would be subversive of the relation which the Constitution intends that inferior tribunals shall hold to this court. . . . The inferior court cannot re-open the case. . . .

(Emphasis added). Or as this Court held in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895),

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered finally settled. . . . The court cannot vary it, or examine it for any other purpose than execution; . . . or review it *even for apparent error, upon any matter decided on appeal;* or intermeddle with it, further than to settle so much as has been remanded.

(Emphasis added). *See also Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978). An inferior court, on remand, is required to treat as conclusive the determinations and findings of this Court. Therefore, the Supreme Court of Kentucky was not free to ignore this Court's finding that Shapero's request was denied by the Supreme Court of Kentucky, *even if the Supreme Court of Kentucky believed that finding to be in error.*

In *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1872), the plaintiff successfully challenged in the Supreme Court of the United States the dismissal by the Supreme Court of Missouri of his petition. In so doing, this Court determined that the plaintiff had legal title to the disputed land and remanded the case for further proceedings in conformance with this Court's opinion. On remand, the Supreme Court of Missouri amended its previous judgment and dismissed the petition because the petition sought equitable relief with respect to the land in dispute, and legal title to the land could not be determined in an equitable proceeding. Since the plaintiff had an adequate remedy at law, the Missouri court concluded that the suit could not be maintained.

In once again reversing the Supreme Court of Missouri, the Supreme Court of the United States held:

> State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. Such a question, that is the question whether the legal title was in the plaintiff, and whether or not he had a plain, adequate and complete remedy at law, might have been raised in the court of original jurisdiction, and perhaps it might have been raised here when the case was before the court on the first writ of error, but it is clear that it was too late to raise any such questions after the whole case had been decided and the cause remanded for final judgment.

84 U.S. at 284-85 (footnote omitted).

Just as the Supreme Court of Missouri erred when it ruled that the case was improperly before it because an equitable, as opposed to a legal petition, had been filed, so too did the Supreme Court of Kentucky err when it held that Shapero's request to mail his letter was not properly before it and it therefore could not have rendered any decision with respect to that request. However, paraphrasing *Tyler,* on remand of Shapero's case, it is "clear that it [is] too late [for the Supreme Court of Kentucky] to raise any such questions after the whole case ha[s] been decided and the cause [has been] remanded for final judgment." If Missouri or Kentucky courts were permitted to reconsider findings made by the Supreme Court of the United States, this procedure "would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect." *Tyler,* 84 U.S. at 282-83. In addition, permitting inferior courts, on remand, to ignore this Court's findings would bode ill for any concept of a *Supreme* Court of the United States under Article III, Section 1 of the Constitution of the United States.

Since this Court is, by and large, a court of appellate jurisdiction which must rely on inferior courts to carry out its mandates, it is of critical importance that these inferior courts abide by and act consistently with this Court's findings. Accordingly, a writ of certiorari to review and summarily to reverse the judgment below is of importance far beyond the facts of this case.

2. The Decision Below Conflicts with Recent Decisions of this Court and of Federal Courts of Appeals and with the Legislative History of the Civil Rights Attorney's Fees Act of 1976.

The Supreme Court of Kentucky in its decision, on remand, in *Shapero II,* ruled that in a proceeding brought to vindicate civil rights, unless a petitioner prevails *and* obtains "personal redress," he or she may not be awarded attorneys' fees under 42 U.S.C. section 1988. Under the holding of the Supreme Court of Kentucky, for example, a plaintiff who is successful in obtaining a declaration that a particular governmental policy, such as an advertising ban, is unconstitutional may not recover attorneys' fees unless he or she obtains personal redress above and beyond the mere declaration that the governmental policy was illegal. Similarly, under *Shapero II,* a class plaintiff who is ultimately unsuccessful in obtaining personal redress may not recover attorneys' fees even though complete relief on all class claims is obtained. Essentially, the Supreme Court of Kentucky has read out of 42 U.S.C. section 1988 any concept of "private attorneys general" as a basis for the recovery of attorneys' fees. Not only is this decision ill-conceived and flatly contrary to the well-nigh universal rule that private attorneys general are permitted to recover attorneys' fees in civil rights cases, but it also directly conflicts with the legislative history of 42 U.S.C. section 1988, prior decisions of this Court, and the decisions of numerous federal courts of appeal.

In the legislative history of the Civil Rights Attorney's Fees Act of 1976 in S. REP. NO. 1011, 94th Cong., 2d Sess. (1976) at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910, the Senate Committee emphasized the importance of the "private attorneys general" concept in awarding attorneys' fees, quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968):

> If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

See also H. R. REP. NO. 1558, 94th Cong., 2d Sess. (1976) at 2. The private attorneys general concept is firmly rooted in early congressional debates which ultimately led to the passage of 42 U.S.C. section 1988. This concept can be traced back at least to June 12, 1975, when one of the sponsors of the Federal Courts Attorney's Fees Act of 1975 (H.R. 7826, 94th Cong., 1st Sess. (1975)) stated:

> What is most distressing about *Alyeska* [*Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)] is that it will discourage and effectively preclude the filing of meritorious public interest cases seeking the enforcement of Federal law. These "private attorney general" cases are an integral part of the overall national system to enforce the laws and civil and Constitutional rights. These public interest cases have frequently vindicated important public rights, *not simply private causes of actions.*

(Emphasis added.) 121 CONG. REC. H5418 (daily ed. June 12, 1975) (statement of Rep. Seiberling).

This Court recently emphasized that the 1976 Attorney's Fees Act, 42 U.S.C. section 1988, was clearly meant to apply to such private attorneys general, public issue cases in *Texas State Teachers Association* v. *Garland Independent School District*, 57 U.S.L.W. 4383 (U.S. March 28, 1989) (No. 87-1759). In *Garland*, the petitioners, although they had obtained no purely personal relief, had "obtained a judgment vindicating the First Amendment rights of public employees in the workplace. Their success ha[d] materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities." Similarly, Shapero, in the decision of the Supreme Court of the United States, vindicated important First Amendment rights of Kentucky and other attorneys, as a group. Paraphrasing *Garland*, his success has materially altered the Kentucky Bar Association's policy limiting the rights of attorneys to communicate with prospective clients concerning employment.

By achieving similar relief, in *Garland*, the Supreme Court of the United States held that "Petitioners have thus served the 'private attorney general' role which Congress meant to promote enacting the Civil Rights Attorney's Fees Awards Act of 1976." Shapero has accomplished no less by his success in the Supreme Court of the United States.

Not only does the Supreme Court of Kentucky's decision depreciate any concept of the "private attorney general," but, taken literally, its "personal redress" precondition to an award of attorneys' fees would preclude the granting of attorneys' fees to prevailing parties who have sought only declaratory but not personal relief.

Three months before the Supreme Court of Kentucky denied Shapero's request for attorneys' fees, this Court set forth the relationship between declaratory judgments and section 1988 attorneys' fees awards in *Rhodes* v. *Stewart,* 109 S. Ct. 202 (1988). "A declaratory judgment, in this respect is no different from any other judgment. It will constitute relief, for purposes of section 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff." 109 S. Ct. at 203. No one could deny that this Court's decision in *Shapero* affected the behavior of the Kentucky Bar Association towards the Plaintiff Shapero. Following the Supreme Court of the United States' decision in *Shapero,* the Supreme Court of Kentucky and the Kentucky Bar Association could no longer apply to Shapero, or any other Kentucky lawyer, the rule declared unconstitutional by the Supreme Court of the United States in its *Shapero* decision.

Similarly, the very case that the Supreme Court of Kentucky held was "inapposite" in *Shapero II,* because the plaintiffs in that case had obtained "personal

redress," whereas Shapero had not, was a case in which the plaintiffs obtained *only* a declaratory judgment, but were nonetheless awarded attorneys' fees under section 1988. In that case, *Americans United for Separation of Church and State* v. *School District of Grand Rapids,* 835 F.2d 627 (6th Cir. 1987), the plaintiffs were residents and taxpayers of Grand Rapids, Michigan, and obtained a declaration under the Federal Declaratory Judgment Act, 28 U.S.C. sections 2201-2202, that the program in which a public school system leased classrooms and buildings from religious non-public schools violated the Establishment Clause of the First Amendment and obtained a permanent injunction against continuation of the program. Likewise, Shapero obtained a declaration that the blanket prohibition against targeted direct mail advertising by lawyers was unconstitutional. Thus, the "personal redress" obtained by the plaintiffs in *Americans United* was no more personal than the redress obtained by Shapero. In essence, both Shapero and the plaintiffs in *Americans United* only obtained declaratory relief and were, therefore, equally entitled to attorneys' fees under section 1988.

The Supreme Court of Kentucky's holding in *Shapero II* is contrary to the holdings in several other Court of Appeals cases where the plaintiffs obtained declaratory but no personal relief yet were still held to be entitled to attorneys' fees under section 1988: *Nash* v. *Chandler,* 848 F.2d, 567 (5th Cir. 1988) (plaintiffs dropped damage claims and obtained a declara-

tion that statute was unconstitutional); *Seattle School District No. 1* v. *State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) (plaintiffs obtained declaration that statute was unconstitutional); *McCurry* v. *Tesch*, 824 F.2d 638 (8th Cir. 1987) (plaintiffs obtained declaratory judgment but failed to win damages and an injunction); and *Solomon* v. *City of Gainesville*, 796 F.2d 1464 (11th Cir. 1986) (city sign ordinance declared unconstitutional; plaintiff waived damages claim).

The direct conflict between the opinion of the Supreme Court of Kentucky and decisions of this Court, other federal courts and the legislative history of 42 U.S.C. section 1988 justifies the granting of certiorari to review the judgments of the Supreme Court of Kentucky in *Shapero II* and *Shapero III*.

CONCLUSION

This is the second time this case will have been before the Supreme Court of the United States. In *Shapero* v. *Kentucky Bar Association*, 108 S. Ct. 1916 (1988), this Court reversed a targeted direct mail solicitation blanket ban adopted by the Supreme Court of Kentucky in the face of this Court's explicit and unambiguous holding in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Once again this Court is faced with a decision by the Supreme Court of Kentucky which contradicts well-established precedents of this Court upholding awards of attorneys' fees to prevailing parties who have obtained substan-

tial relief and who have fundamentally altered the legal relationship between themselves and the responding parties. This Court should not tolerate the Supreme Court of Kentucky's bold rejection of its responsibilties under explicit federal law and rules decisions through the expedient of changing its findings after those findings have already been employed as a basis for reversal in this Court. This Court should not permit the Supreme Court of Kentucky or any court to ignore its findings or its mandates.

Petitioner's writ of certiorari should be granted, the decisions of the Supreme Court of Kentucky in *Shapero II* and *Shapero III* should be summarily reversed, and this Court should order that attorneys' fees in the amount sought by the Petitioner be awarded.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

I

In 1985, petitioner, a member of Kentucky's integrated Bar Association, see Ky. Sup. Ct. Rule 3.030 (1988), applied to the Kentucky Attorneys Advertising Commission[1]

[1]The Attorneys Advertising Commission is charged with the responsibility of "regulating attorney advertising as prescribed" in the Rules of the Kentucky Supreme Court. Ky. Sup. Ct. Rule 3.135(3) (1988). The Commission's decisions are appealable to the Board of Governors of the Kentucky Bar Association, Rule 3.135(8)(a), and are ultimately reviewable by the Supreme Court of Kentucky. Rule 3.135(8)(b). "Any attorney who is in doubt as to the propriety of any professional act contemplated by him" also has the option of seeking an advisory opinion from a committee of the Kentucky Bar Association, which, if formally adopted by the Board of Governors, is reviewable by the Supreme Court of Kentucky. Rule 3.530.

for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

> "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor [*sic*] to *STOP* and give you more time to pay them.
>
> "You may call my office anytime from 8:30 a. m. to 5:00 p. m. for *FREE* information on how you can keep your home.
>
> "Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling."

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Ky. Sup. Ct. Rule 3.135(5)(b)(i).[2] The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment—specifically the principles enunciated in *Zauderer* v. *Office of Disciplinary*

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[2]Rule 3.135(5)(b)(i) provided in full:

"A written advertisement may be sent or delivered to an individual only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Counsel of Supreme Court of Ohio, 471 U. S. 626 (1985)—and recommended that the Kentucky Supreme Court amend its rules. See App. to Pet. for Cert. 11a-15a. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics (Ethics Committee) of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. See Ky. Sup. Ct. Rule 3.530; n. 1, *supra*. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld the Rule 3.135(5)(b)(i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct (1984). App. to Pet. for Cert. 9a.

On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court felt "compelled by the decision in *Zauderer* to order [Rule 3.135(5)(b)(i)] deleted," 726 S. W. 2d 299, 300 (1987), and replaced it with the ABA's Rule 7.3, which provides in its entirety:

> " 'A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.' " 726 S. W. 2d, at 301 (quoting ABA, Model Rule of Professional Conduct 7.3 (1984)).

The court did not specify either the precise infirmity in Rule 3.135(5)(b)(i) or how Rule 7.3 cured it. Rule 7.3, like its predecessor, prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. We granted certiorari to resolve whether such a blanket prohibition is consistent with the First Amendment, made applicable to the States through the Fourteenth Amendment, 484 U.S. ____ (1987), and now reverse.[3]

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[3]We reject respondent's request that we dismiss or affirm this case because "the Supreme Court of Kentucky granted Shapero precisely the relief which he requested." Brief for Respondent 11. The court below did, as respondent prayed, "declare . . . rule [3.135(5)(b)(i)] void," Motion for Review of Advisory Opinion E-310, No. 86-SC-335 (Sup. Ct. Ky.). The court's ultimate disposition, however, was to adopt a new Rule with the same defect that petitioner identified in the old one and to "affirm the decision of the Ethics Committee to deny [petitioner's] request" for approval of his letter. 726 S.W. 2d 299, 301 (1987). Petitioner surely cannot be said to have prevailed below.

Nor does the fact that petitioner never leveled his constitutional challenge specifically against Rule 7.3 mean that this case presents "federal constitutional issues [that were] raised here for the first time on review of [a] state court decisio[n]," *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). The parties briefed and argued the constitutionality of a categorical ban on targeted, direct-mail advertising, and the court below plainly considered and rejected those arguments as it adopted Model Rule 7.3. See 726 S.W. 2d, at 300.

We also decline respondent's invitation to dismiss this case in order to avoid interference with ongoing state judicial proceedings. See *Younger* v. *Harris*, 401 U.S. 37 (1971). Once the court below rendered its final judgment in this case, there was no longer any pending state judicial proceedings.

II

Lawyer advertising is in the category of constitutionally protected commercial speech. See *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest," *Zauderer, supra*, at 638 (citing *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 556 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," *Central Hudson, supra*, at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *In re R. M. J.*, 455 U. S. 191, 203 (1982).

In *Zauderer*, application of these principles required that we strike an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem. We distinguished written advertisements containing such information or advice from in-person solicitation by lawyers for profit, which we held in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), a State may categorically ban. The "unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain." we observed, are "not present" in the context of written advertisements. *Zauderer*, 471 U. S., at 641-642.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general

public. See, *e. g.*, *Bates*, *supra* (newspaper advertising); *id.*, at 372, n. 26 (equating advertising in telephone directory with newspaper advertising); *In re R. M. J.*, *supra* (mailed announcement cards treated same as newspaper and telephone directory advertisements). Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons . . . who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, 726 S. W. 2d, at 301, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who *actually* "need legal services of the kind provided [and advertised] by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail

it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. See also Brief for Respondent 37 (conceding that "targeted direct mail *advertising*"—as distinguished from "*solicitation*"—"is constitutionally protected") (emphasis in original). Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." 726 S. W. 2d, at 301. By analogy to *Ohralik*, the court observed:

> "Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation." 726 S. W. 2d, at 301.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility. Cf. *Ohralik, supra*, at 470 (MARSHALL, J., concurring in part and concurring in judgment) ("What is objectionable about

Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it").

Thus, Respondent's facile, suggestion that this case is merely "*Ohralik* in writing" misses the mark. Brief for Respondent 10. In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," *Zauderer, supra*, at 641. See *Ohralik, supra,* at 457-458, 464-465. Second, "unique . . . difficulties," *Zauderer, supra,* at 641, would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." *Ohralik*, 436 U. S., at 466. See also *ibid.* ("[I]n-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession")(footnote omitted). Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation, *Zauderer*, 471 U. S., at 642. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." *Ibid.* Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his]

sensibilities simply by averting [his] eyes,' " *Ohralik*, *supra*, at 465, n. 25 (quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971)). A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Zauderer*, *supra*, at 642. Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. See Brief for ABA as *Amicus Curiae* 9. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice. See, *e. g.*, *Leoni* v. *State Bar of California*, 39 Cal. 3d 609, 619-620, 704 P. 2d 183, 189 (1985), summarily dism'd, 475 U.S. 1001 (1986).

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See *In re R. M. J.*, 455 U.S., at 203. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, *id.*, at 206, giving the

State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation, *Zauderer, supra,* at 641—solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place," *Ohralik, supra,* at 466—do not apply to written solicitations. The court below offered no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." 726 S. W. 2d, at 301. Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

> "State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading." ABA, Model Rules of Professional Conduct, pp. 93-94 (1984).

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. See *Bates,* 433 U.S., at 379; *id.,* at 387 (Burger, C. J., concurring in part and dissenting in part) (objecting to "enormous new regulatory burdens called for by" *Bates*). As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all

readers. If the targeted letter specifies facts that relate to particular recipients (*e. g.*, "It has come to my attention that your home is being foreclosed on"), the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that lead the lawyer to the fact); it could require the lawyer to explain briefly how she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, see *id.*, at 384 (dictum); *In re R. M. J.*, *supra*, at 206, n. 20, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, *supra*, at 646.

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. See *Ohralik*, 436 U.S. at 463-464, 466. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, see *Bates*, *supra*, at 379-381, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. *Id.*, at 381. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," Brief for Respondent 20, which is not protected. First, respondent asserts that the letter's liberal use of un-

derscored, uppercase letters (*e. g.*, "Call *NOW*, don't wait"; "it is *FREE*, there is *NO* charge for calling") "fairly shouts at the recipient . . . that he should employ Shapero." *Id.*, at 19. See also Brief in Opposition 11 ("Letters of solicitation which shout commands to the individual, targeted recipient in words in underscored capitals are of a different order from advertising and are subject to proscription"). Second, respondent objects that the letter contains assertions (*e. g.*, "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing." Brief for Respondent 20.

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," *id.*, at 19, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. *In re R. M. J.*, 455 U.S., at 203. Nor may a State impose a more particularized restriction without a similar showing.

Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative fact[s]," *In re R. M. J., supra,* at 205 (lawyer's statement, "in large capital letters, that he was a member of the Bar to the Supreme Court of the United States"), or offers overblown assurances of client satisfaction, cf. *In re Von Wiegen,* 63 N. Y. 2d 163, 179, 470 N. E. 2d 838, 847 (1984) (solicitation letter to victims of massive disaster informs them that "it is [the lawyer's] opinion that the liability of the defendants is clear"), cert. denied, 472 U.S. 1007 (1985); *Bates, supra,* at 383-384 ("advertising claims as to the quality of legal services . . . may be so likely to be misleading as to warrant restriction"). Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE O'CONNOR, with whom CHIEF JUSTICE REHNQUIST and JUSTICE SCALIA join, dissenting.

Relying primarily on *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept

employment through advertisements containing information or advice regarding a specific legal problem. See *id.*, at 639-647. I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

Zauderer dealt specifically with a newspaper advertisement. Today's decision—which invalidates a similar rule against targeted, direct-mail advertising—wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." *Zauderer*, *supra*, at 678 (O'Connor, J., concurring in part, concurring in judgment in part, and dissenting in part). For people whose formal contacts with the legal

system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and its officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary interests, will therefore provide less discipline in this context than in the case of general advertising.

Although I think that the regulation at issue today is even more easily defended than the one at issue in *Zauderer*, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements—like general advertisements but unlike the kind of in-person solicitation that may be banned under *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978)—can at least theoretically be regulated by the States through

prescreening mechanisms. In-person solicitation, moreover, is inherently more prone to abuse than almost any form of written communication. *Zauderer* concluded that the decision in *Ohralik* was limited by these "unique features" of in-person solicitation, see 471 U.S., at 641, and today's majority simply applies the logic of that interpretation of *Ohralik* to the case before us.

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. See, *e.g.*, *Boos* v. *Barry*, 485 U.S. ___, ___ (1988). One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Cf., *e.g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. ___, ___ (1988). Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

In *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), however, the Court concluded that the First Amendment protects the communication of the following so-called "idea": "I will sell you the X prescription drug at the Y price." See *id.*, at 761. The Court argued that the public interest requires that private

economic decisions be well-informed, and it suggested that no satisfactory line could be drawn between ideas about public affairs and information relevant to such private decisions. *Id.*, at 762-765. The dissent observed that the majority had overstated the difficulties of distinguishing public affairs from such matters as the "decision . . . to purchase one or another kind of shampoo." *Id.*, at 787 (REHNQUIST, J., dissenting). The dissent also foresaw that the logic of *Virginia Pharmacy* would almost necessarily extend to advertising by physicians and attorneys. *Id.*, at 785. This prediction soon proved correct, see *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and subsequent decisions have radically curtailed the power of the States to forbid conduct that I believe "promote[s] distrust of lawyers and disrespect for our own system of justice." *Id.*, at 394 (Powell, J., concurring in part and dissenting in part).

The latest developments, in *Zauderer* and now today, confirm that the Court should apply its commercial speech doctrine with more discernment that it has shown in these cases. Decisions subsequent to *Virginia Pharmacy* and *Bates, supra*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.

> "Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment's protection only recently. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of

> speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn., supra,* at 455-456 (footnote omitted).

A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York,* 447 U.S. 557, 566 (1980). Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that that is "*potentially* or demonstrably misleading," *In re R. M. J.,* 455 U.S. 191, 202 (1982) (emphasis added), *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

As soon as one steps into the realm of prices for "routine" legal services such as uncontested divorces and personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases. Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a "routine" divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by "routine" legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some clients' cases as anything but routine. It may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys. That task, however, is properly left to the States, and it is certainly not a fit subject for constitutional adjudication. Under the *Central Hudson* test, government has more than ample justification for banning or strictly regulating most forms of price advertising.

Solicitation practices like the "free sample" techniques approved by *Zauderer* and today's decision are even less deserving of constitutional protection than price advertising for supposedly routine legal services. Applying the *Central Hudson* test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial in-

terest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment. This is especially true when the solicitation includes the offer of a "free sample," as petitioner's proposed letter does. I therefore conclude that American Bar Association Model Rule of Professional Conduct 7.3 (1984) sweeps no more broadly than is necessary to advance a substantial governmental interest. See *Central Hudson, supra*, at 566. The Kentucky Supreme Court correctly found that petitioner's letter could permissbly be banned under Rule 7.3, and I dissent from the Court's decision to reverse that judgment.

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations. In *Bates*, for example, the majority appeared to demand conclusive proof that the country would be better off if the States were allowed to retain a rule that served "to inhibit the free flow of commercial information and to keep the public in ignorance." 433 U.S., at 365. Although the opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was little more than a bare conclusion that "We are not persuaded that price advertising will harm consumers." See *id.*, at 368-379. Dismissing Justice Powell's careful critique of the implicit legislative fact-finding that underlay its analysis, the *Bates* majority simply insisted

on concluding that the benefits of advertising outweigh its dangers. Compare *id.*, at 373, n. 28, with *id.*, at 391-400 (Powell, J., concurring in part and dissenting in part). In my view, that policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its applicaton. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. See, *e.g.*, Hazard, Pearce, & Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N. Y. U. L. Rev. 1084 (1983). Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertis-

ing, and perhaps sometimes an intended effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming *arguendo* that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. See generally R. Pound, The Lawyer from Antiquity to Modern Times (1953). Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subject to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it cer-

tainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a sub-class of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional

theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. Compare, *e.g.*, *Bates*, 433 U.S., at 370-372, with *id.*, at 400-401, and n. 11 (Powell, J., concurring in part and dissenting in part). In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD D. SHAPERO, - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, - - - *Respondent*

IN SUPREME COURT

OPINION AND ORDER

Petitioner, Richard D. Shapero, filed a motion in this Court for a briefing schedule on the issues of his right to an award of attorney fees and expenses in this action. This Court has denied the motion for a briefing schedule because the motion and response already provide adequate briefing, and in this Opinion we deny Petitioner's request for the reasons that follow.

The following facts give rise to Petitioner's motion. Using SCR 3.135, Petitioner submitted a proposed letter to the Kentucky Attorneys Advertising Commission for approval. Petitioner planned to send the letter which constituted direct targeted mail advertising to potential clients with a foreclosure suit filed against them. The Advertising Commission found that the proposed letter violated SCR 3.135(b)(i), since withdrawn, which then prohibited a letter "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." After failing to obtain approval from the

Advertising Commission, Petitioner *abandoned* the proceeding although SCR 3.135(8) provided a right to appeal.

He then separately petitioned for an informal advisory opinion from the Committee on Legal Ethics, a procedure provided by SCR 3.530. Instead of just issuing an informal opinion, following the procedure for which the rule provides the Ethics Committee asked the Board of Governors to adopt and issue a formal advisory opinion. The Board of Governors issued formal advisory opinion E-310. Opinion E-310 held that *an* attorney (any attorney) may not write "a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services."

Petitioner next sought review in this Court of the Board's formal advisory opinion, as provided for in SCR 3.530. We granted review and affirmed Ethics Opinion E-310 in substance. Our Opinion also deleted SCR 3.135 (b)(i) and adopted the new model rule, Rule 7.3, from the ABA Model Code of Professional Responsibility. We based our holding on the belief that "submisson of a blank form letter to the Advertising Commission [does not] provide[] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." *Shapero* v. *Kentucky Bar Ass'n.*, Ky., 726 S.W. 2d 299 (1987).

Our judgment was reversed by the Supreme Court of the United States, with the Kentucky Bar Association being ordered to pay Petitioner $383.21 for his costs. *Shapero* v. *Kentucky Bar Ass'n.*, 486 U.S. __, 100 L. Ed. 2d 475, 108 S.Ct. 1916 (1988).

Petitioner now seeks recovery of attorney fees and expenses incurred in the previously discussed proceedings before the Kentucky Supreme Court and the United States Supreme Court. Petitioner argues that he is entitled to

an award of attorneys fees[1] and expenses under 42 U.S.C. § 1988. Section 1988 allows a court, in its discretion, to award the prevailing party reasonable attorney fees in an action to enforce a provision of 42 U.S.C. § 1983. Section 1983 creates a civil action against persons acting under color of the state law when their actions deprive the plaintiffs of rights secured by the Constitution. Petitioner maintains that a blanket ban on targeted direct mail advertisements violated his constitutional rights under the First and Fourteenth Amendments of the United States Constitution. He argues further that this Court's review of the Advisory Opinion was an action to redress this violation of his civil rights.

Petitioner failed to mention Section 1983 in his Brief to our Court when we reviewed the Board of Governors Advisory Opinion. Petitioner submits that this failure is not fatal to his award of attorney fees and expenses. He relies on *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 835 F. 2d 627 (6th Cir. 1987), as authority for this position. We need not decide whether to follow this precedent because the present situation is inapposite.

In *Americans United* plaintiffs "were the prevailing parties in an *action to enjoin* programs by which a public school system leased classrooms in buildings of religious nonpublic school associations." *Id.* at 628. The Sixth Cir-

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[1]The attorney fees requested, in the amount of $60,025.00, include hourly rates for paralegals and law clerks. The United States Supreme Court has granted review of *Blanchard* v. *Bergeron*, 831 F. 2d 563 (5th Cir. 1987). One of the issues in *Blanchard* is whether the time of paralegals and law clerks should be considered in an award of reasonable attorney fees under 42 U.S.C. § 1988. Granting review of this issue puts in doubt the recoverability of other expenses under § 1988. Petitioner seeks recovery of other expenses, such as copying and cab fare, in this proceeding.

cuit held that prevailing parties in an action against state authorities to vindicate constitutional rights do not have to specifically plead or rely upon Section 1983 to be entitled to attorney fees under Section 1988.

Petitioner's challenge to Ethics Opinion E-310 differed from *Americans United* in one fatal respect. In *Americans United*, the plaintiffs petitioned for, and obtained, personal redress. Specific action was sought *and* was taken against the defendants. In our Court, Petitioner sought only review of "the attached Opinion of the Kentucky State Bar Association." He did not seek anything more than an opinion from us overruling an ethics opinion. He never appealed denial of his right to send the letter submitted to the Advertising Commission as provided for in SCR 3.135(8). We granted review of an advisory opinion, not review of any action taken against Mr. Shapero. The only action taken against Mr. Shapero was taken by the Advertising Commission. This action was never appealed.

The Advisory Opinion published by the Board of Governors had no legally binding effect on Shapero, before or after we affirmed it. If he had proceeded to mail the letter and disciplinary proceedings had been instituted, and thereafter he had been enjoined or disciplined, then and only then, would action have been taken against him. The effect of the KBA Advisory Opinion, and of our Opinion, was no more binding on Mr. Shapero than on any other member of the Bar.

Our Opinion in *Shapero* v. *Kentucky Bar Ass'n.* erroneously stated that we affirmed the decision of the Ethics Committee in denying the request. We affirmed the Opinion of the Ethics Committee as stated in the Advisory Opinion, but neither the Committee nor this Court denied any request. The Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter. The Ethics Committee had no authority to grant or deny per-

mission to send the proposed letter. Jurisdiction lay in the Advertising Commission. Petitioner received the ruling of the Advertising Commission but chose not to appeal the ruling. SCR 3.135(8) allows "any person aggrieved by a notice of proposed disapproval or a final decision of the [Advertising] Commission" to appeal to the Board of Governors and to appeal the Board's decision to the Kentucky Supreme Court. Petitioner did not select this route. The wording of our Opinion in the *Shapero* case was in error in assuming there was a "request" before us to deny, but this mistake does not create a right where none exists.

Because we decide that this case bears no similarity to a Section 1983 action, it is unnecessary to reach other issues regarding computation of attorneys fees and expenses set forth and discussed in the Motion and Pesponse.

Based on the record in this case, we deny the Petitioner's motion for attorney fees and expenses.

All concur.

ENTERED: January 19, 1989.

(s) Robert F. Stephens
Chief Justice

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TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD SHAPERO - - - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

IN SUPREME COURT

ORDER

Petitioner has filed a motion styled "Motion for Final Judgment," requesting this Court to take two actions.

First, petitioner moves this Court to enter an Order setting aside so much of our decision in *Shapero* v. *Kentucky Bar Ass'n*, Ky., 726 S.W. 2d 229 (1987), as adopts Model Rule 7.3 "as the law of this Commonwealth." *Id.* at 301. The Opinion of the United States Supreme Court, 486 U.S. —, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988), reversing our approval of Ethics Opinion E-310 is the law in this matter. It is both unnecessary and inappropriate for us to take any further action.

Petitioner also requests we approve his targeted direct mail advertisement, or, in the alternative, remand the matter of approval for reconsideration by the Kentucky Attorneys Advertising Commission. The reasons we have not so acted are set out in *Shapero* v. *Kentucky Bar Ass'n*, rendered January 19, 1989. Petitioner sought review in our Court of Ethics Opinion E-310. He did not appeal the Advertising Commission's disapproval of the submitted

letter as provided for in SCR 3.135(8). The issue of approval has never been before this Court. Therefore, approval or remand to the Advertising Commission is inappropriate.

Petitioner Shapero's motion is denied

All concur.

ENTERED: April 6, 1989

(s) Robert F. Stephens
Chief Justice

RENDERED. NOVEMBER 26, 1986
AS MODIFIED MARCH 27, 1987

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD D. SHAPERO, - - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, - - - *Respondent*

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This is a petition for review of Supreme Court Rule 3.135(5)(b)(i) which has been interpreted by the advertising commission to prohibit direct targeted mail advertising by lawers.

The question is whether the rule violates the First and Fourteenth Amendments to the United States Constitution.

Shapero argues that the targeted direct mail advertising rule does not advance a substantial governmental interest and the rule is more restrictive than necessary in view of the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. —, 85 L. Ed. 2d 652, 670, 105 S. Ct. — (1985).

Supreme Court Rule 3.135(5)(b)(i) provides:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time,

and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

In 1985, the United States Supreme Court in a plurality decision ruled that an attorney may not be disciplined for soliciting legal business through printed newspaper advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients. *Zauderer, supra.*

Following the *Zauderer* decision, Shapero, a Louisville attorney, pursuant to SCR 3.135(6)(b), submitted to the Lawyers' Advertising Commission of the Kentucky State Bar Association, the blank form of a letter he proposed to send to potential clients who had a foreclosure suit filed against them. The advertising commission determined that the letter proposed is a violation of SCR 3.135(5)(b)(i) because it is a letter precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public. The advertising commission did not find that the letter was false, misleading or deceptive. Thereafter, Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct-mail letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.

The rule as now written which was interpreted by the Advertising Commission and the Ethics Committee to be in conflict with the interpretation of the United States Supreme Court of the First and Fourteenth Amendments to the United States Constitution as expressed in *Zauderer* should be deleted.

In that case, the United States Supreme Court determined that lawyer advertising is a form of commercial free speech protected by the First Amendment and that advertising by attorneys may not be subjected to blanket suppression. The specific cases involved newspaper advertising; this case involves direct targeted mail.

In re R.M.J., 455 U.S. 191, 71 L. Ed. 2d 64, 102 S. Ct. 929 (1982), quoting *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) holds that while misleading advertising may be prohibited entirely, the states may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive. The state may exercise its authority to regulate legal advertising only when it can assert a substantial interest and the interference with commercial free speech must be in proportion to the interests served. *In re R.M.J., supra.* The United States Supreme Court has struck down bans on legal advertising that include targeted direct mail advertising for nonpecuniary reasons. *See In re Primus*, 436 U. S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978).

The Ethics Committee cited Rule 7.3 of the Model Rules of Professional Conduct which were adopted by the American Bar Association several years before the United States Supreme Court's decision in *Zauderer* which prohibits solicitation for pecuniary gain. However, the Kentucky Ethics Committee did not determine that the proposed blank-form letter was misleading, potentially misleading, deceptive or false. The Model Rules have been proposed in Kentucky but never formally adopted.

The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and

whether the targeted direct mail may be prohibited because it is improper solicitation and the rule is in proportion to the governmental interest served.

In view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted.

It is the decision of this Court that Supreme Court Rule 3.135(5)(b)(i) be deleted.

The state is free to fashion any reasonable restriction with respect to time, place and manner of solicitation by the members of its bar association. *In re Primus, supra.* The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978). Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

Ohralik, supra, held that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of a prophylactic measure preventing it. The courts have recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation and other varieties of speech where the same types of regulations might be improper.

Ohralik specifically found that the free speech element is an essential but subordinate component of a situation

of in-person solicitation by a lawyer of a potential client. We agree.

This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing.

The model rule, *Rule 7.3*, which is proposed for adoption in Kentucky provides as follows:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has

> no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

This is an appropriate rule which we adopt as the law of this Commonwealth.

We affirm the decision of the Ethics Committee to deny the request.

Stephens, C.J., and Gant, Lambert, Leibson, Stephenson, and Wintersheimer, JJ., concur.
Vance, J., dissents.

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